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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)	3:13-cr-117-LRH-VPC
)	
Plaintiff,)	Defendant B. Singh's Motion To Suppress
)	Evidence Obtained And Derived Both
v.)	From Electronic Surveillance And Physical
)	Searches Conducted Pursuant to The
BALWINDER SINGH,)	Foreign Intelligence Surveillance Act of
aka Jhaji,)	1978 (FISA), As Amended, 50 U.S.C. §§
aka Happy,)	1801-1812 And 1821-1829.
aka Possi,)	
aka Baljit Singh)	(Franks Evidentiary Hearing Requested)
Defendant.		

CERTIFICATION

This motion is timely filed on or before **July 1, 2016**. ECF No. 44. Responses are due on or before **October 3, 2016**; replies are due on or before **November 3, 2016**. ECF No. 44.

MOTION

Defendant Baljit Singh (charged as Balwinder Singh) ("Singh"), by and through his attorney, moves to suppress all fruits of the government's Foreign Intelligence Surveillance Act (FISA) electronic surveillance and physical searches. First, Singh's counsel requests that this Court conduct an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), in order to provide Singh's counsel with the opportunity to prove that the FISA applications and FISA affidavits made to the Foreign Intelligence Surveillance Court (FISC) recklessly omitted material information from

1 the FISA applications. In connection with this request, Singh's counsel has filed a motion for
 2 disclosure of FISA applications and affidavits and FISC orders and extensions. Second, Singh's
 3 counsel contends that the government under FISA must satisfy this Court that all statutory
 4 requirements were met when conducting its two plus years of FISA-based electronic surveillance and
 5 physical searches. In connection with that motion, Singh's counsel has filed a motion for an *in*
 6 *camera*, *ex parte* review by this Court, if the government opposes disclosure on the basis that it
 7 would harm the national security of the United States and this Court does not otherwise order
 8 disclosure. Third, Singh's counsel contends that FISA, as amended, is unconstitutional.

9 POINTS & AUTHORITIES

10 I. **Background To The Singh Investigation Before FISA Applications.**

11 The FBI initiated what it termed a "full investigation" of Singh on August 9, 2011. USAO
 12 001649. However, no discovery document produced to date indicates what, if anything, the FBI did
 13 in this investigation between August 9, 2011 and September 14, 2011. And, based upon the
 14 discovery produced to date from September 14, 2011 through October 28, 2011, it appears that the
 15 FBI did little, if any, investigation at all, before making application for electronic surveillance under
 16 50 U.S.C. § 1804.

17 A. **September of 2011 Investigation.**

18 On September 14, 2011, discovery indicates that the FBI was told by a Special Agent of the
 19 Department of Homeland Security that Singh received Legal Permanent Resident status on April 4,
 20 2011 which expires in May of 2021. USAO 001701. The FBI then requested Singh's immigration
 21 or "A" file from the Department of Homeland Security for "further review." USAO 001701. On
 22 September 14, 2011, discovery also indicates that the FBI spoke with a single witness, Kamwal
 23 Khera, a former employer of Singh and Singh's wife. USAO 005577-005580. He made various
 24 allegations that Singh had told him many things but the discovery omits investigation to corroborate
 25 any of these mere allegations or the motives underlying the making of the allegations. On September
 26 27, 2011, the FBI reviewed Singh's "A" file at the Reno office of the Department of Homeland
 27 Security. USAO 001649.

1 On September 28, 2011, the FBI contacted Kamwal Khera again. USAO 005575. Kamwal
2 Khera told the FBI that he employed Singh from May of 2009 to April of 2010. USAO 001649. On
3 September 29, 2011, the four FBI Special Agents conducted a surveillance of Singh near the Century
4 Park Lane 16 movie theater. USAO 003694-003695. The FBI Special Agents saw Singh park his red
5 semi-tractor trailer in a vacant lot west of the movie theater and then walk westbound on Cadillac
6 Avenue until walking into the Lakeview Apartment complex toward Building 602. *Id.* At this point,
7 Singh's surveillance was discontinued. *Id.* On September 30, 2011, the FBI photographed Singh's
8 semi truck with California license plate #VP68895. USAO 003881.

9 **B. October of 2013 Investigation.**

10 On October 13, the FBI phoned the California Department of Motor Vehicles regarding
11 California license plate #VP68895. USAO 003688-003689. The FBI learned between October 13
12 and 17, 2011 that Singh purchased the semi-truck from Folsom Trucking in California and was most
13 likely in the process of selling the semi-truck to a Kaur Tejinder who had not completely paid for
14 the truck. *Id.* On October 14, 2011, the FBI had a person (whose identity is blacked out in discovery)
15 initiate surveillance at 602 Brinkby Avenue, Reno, Nevada where this person saw Singh's wife at
16 the bottom of the stairwell just underneath the balcony that read "308". USAO 003889. Discovery
17 produced to date shows no other surveillance, interviews or investigation in October of 2011.

18 That is the some total of the "investigation" conducted in August, September and October
19 by the FBI as shown by the discovery documents to date. Therefore, the FBI did little, if any,
20 investigation, prior to making its initial FISA electronic surveillance application and receiving an
21 order authorizing the same from the FISC.

22 **C. FISA electronic surveillance and FISA physical searches and seizures.**

23 By no later than October 28, 2011, two things had happened: (1) a federal officer had made
24 FISA application under 50 U.S.C. § 1804 to a judge having jurisdiction under 50 U.S.C. § 1803 for
25 an order approving electronic surveillance with Singh as the target of that application; and (2) the
26 FISC under 50 U.S.C. § 1805 had issued an ex parte order approving electronic surveillance with
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1 Singh the target of that application. See USAO 004945-004950 (unofficial and uncertified 2011-10-
2 28 transcript of intercepted audio phone call allegedly made by “Balwinder” to “Unknown Male”).
3 The FISA applications must have sought multiple extensions for electronic surveillance as
4 surveillance continued up to and including December 17, 2013, which is when Singh was “arrested”
5 by federal agents. ECF No. 11 (“person was arrested on 12-17-13”).

6 Additionally, prior to April 25, 2012, a FISA application was made under 50 U.S.C. § 1823
7 to a judge having jurisdiction under 50 U.S.C. § 1803 for an order approving physical searches and
8 seizures, and the FISC under 50 U.S.C. § 1824 had issued an ex parte order approving physical
9 searches with Singh as the target of that application. USAO 003585. Subsequent FISA applications
10 or extensions must have been made and the FISC issued ex parte orders for the August 21, 2012,
11 March 31, 2013, November 19, 2013, November 30, 2013, and December 11, 2013 physical
12 searches. USAO 003585-003588.

13 None of the government’s FISA applications, affidavits, certifications, extensions, FISC
14 orders, and other documents relating to the FISA electronic surveillance and physical search have
15 not been provided to Singh’s counsel.

16 **II. The Prosecution Has Given Notice Of Its Intent To Use Foreign Intelligence**
17 **Surveillance Act Evidence Obtained Or Derived From Electronic Surveillance**
18 **Under 50 U.S.C. §§ 1806(c) And 1825(d). Therefore, This Motion To Suppress**
19 **Is Ripe And Singh Has Standing.**

20 On December 20, 2013, the prosecution filed its notice of intent to use Foreign Intelligence
21 Surveillance Act (FISA) information in this prosecution. ECF No. 5. Specifically, the notice of intent
22 stated that:

23 pursuant to Title 50, United States Code, Sections 1806(c) and
24 1825(d), the United States intends to offer into evidence, or otherwise
use or disclose in any proceedings in the above-captioned matter,
information obtained or derived from electronic surveillance and
physical searches conducted pursuant to the Foreign Intelligence
Surveillance Act of 1978 (FISA), as amended,

25 ECF No. 5, pp. 1:21-2:02.

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1 Based upon this notice of intent, a motion to suppress is ripe and Singh has standing to
 2 pursue suppression. 18 U.S.C. § 1806(e) provides the following regarding electronic surveillance:

3 Any person against whom evidence obtained or derived from an
 4 electronic surveillance to which he is an aggrieved person is to be, or
 5 has been, introduced or otherwise used or disclosed in any trial,
 6 hearing, or other proceeding in or before any court ... of the United
 7 States ... may move to suppress the evidence obtained or derived from
 8 such electronic surveillance on the grounds that– (1) the information
 was unlawfully acquired; or (2) the surveillance was not made in
 conformity with an order of authorization or approval. Such a motion
 shall be made before the trial, hearing, or other proceeding unless
 there is no opportunity to make such a motion or the person was not
 aware of the grounds of the motion.

9 18 U.S.C. § 1806(e).

10 And 18 U.S.C. § 1825(f) provides the following regarding physical searches:

11 (1) Any person against whom evidence obtained or derived from a
 12 physical search to which he is an aggrieved person is to be, or has
 13 been, introduced or otherwise used or disclosed in any trial, hearing,
 14 or other proceeding in or before any court ... of the United States ...
 may move to suppress the evidence obtained or derived from such
 search on the grounds that – (A) the information was unlawfully
 15 acquired; or (B) the physical search was not made in conformity with
 an order of authorization or approval.
 16 (2) Such a motion shall be made before the trial, hearing, or other
 proceeding unless there is no opportunity to make such a motion or
 the person was not aware of the grounds of the motion.

17 18 U.S.C. § 1825(f). Therefore, this motion to suppress is ripe.

18 Further, Singh has standing. 18 U.S.C. §§ 1806(e) & 1825(f). An “aggrieved person” under
 19 50 U.S.C. § 1801(k) is “a person who is the target of an electronic surveillance or any other person
 20 whose communication or activities were subject to electronic surveillance.” 50 U.S.C. § 1801(k).
 21 And an “aggrieved person” under 50 U.S.C. § 1821(2) is “a person whose premises, property,
 22 information, or material is the target of physical search or any other person whose premises,
 23 property, information or material was subject to physical search.” 50 U.S.C. § 1821(2).

24 Singh is an “aggrieved person” under both 50 U.S.C. §§ 1801(k) and 1821(2). *United States*
 25 *v. Cavanagh*, 807 F.2d 787, 789 (9th Cir. 1987) (target of electronic surveillance and party to an
 26 intercepted communication each have standing to challenge the lawfulness of the surveillance).
 27 Singh not only appears to be a party to thousands of intercepted communications but also the target
 28

of numerous FISA applications with the first one prior to October 28, 2011. Therefore, he has standing to pursue this motion to suppress under 50 U.S.C. §§ 1806(g) and 1825(h).

III. **Singh's Counsel Requests A Franks Hearing Because Material Information Recklessly Omitted From The FISA Applications And Affidavits Made To The FISC Impacts The Necessary Findings Under 50 U.S.C. §§ 1805 And 1824.**

A. *Franks* principles apply to FISA motions to suppress.

The principles underlying *Franks v. Delaware*, 438 U.S. 154 (1978) apply in the context of FISA and FISC motions to suppress. *United States v. Duggan*, 743 F.2d 59, 77 n.6 (2d Cir. 1984) (concluding that “the principles set forth in [*Franks*]” govern in FISA proceedings). In *Franks*, the Supreme Court held:

We reverse, and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Franks v. Delaware, 438 U.S. 154, 155-156 (1978).

Courts have extended the *Franks* standard with regard to intentional or reckless material false statements to intentional or reckless material omissions. In *United States v. Stanert*, 762 F.2d 775, 780-81, *modified*, 769 F.2d 1410 (9th Cir. 1985), the Ninth Circuit held:

Today, we expressly hold that the Fourth Amendment mandates that a defendant be permitted to challenge a warrant affidavit valid on its face when it contains deliberate or reckless omissions of facts that tend to mislead. ... The use of deliberately falsified information is not the only way by which police officers can mislead a magistrate when making a probable cause determination. By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning.

Stanert, 762 F.2d at 781, citing *Franks*, 438 U.S. at 168.

Misstatements or omissions of government officials which are incorporated in an affidavit for a search warrant are grounds for a *Franks* hearing, even if the official at fault is not the affiant. *United States v. DeLeon*, 979 F.2d 761, 763-64 (9th Cir. 1992). The defendant need not present “clear proof of deliberate or reckless omissions or misrepresentations at the pleading stage.” *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1111 (9th Cir. 2005). *United States v. Chesher*, 678 F.2d

1 1353, 1362 (9th Cir. 1982), citing *Franks*, 438 U.S. at 171 n. 8. *See United States v. Kyllo*, 37 F.3d
 2 526, 529-30 (9th Cir. 1994) (vacating and remanding for *Franks* hearing).

3 **B. The Necessary Findings Under 50 U.S.C. §§ 1805 and 1824.**

4 Upon an application made pursuant to 50 U.S.C. §§ 1804 and 1823, the FISC judge shall
 5 enter and ex parte order as requested or modified approving the electronic surveillance and physical
 6 searches if the judge finds that: (a) the application has been made by a Federal officer and approved
 7 by the Attorney General; (b) the proposed minimization procedures meet the definition of
 8 minimization contained in 50 U.S.C. § 1801(h); and (c) the application which has been filed contains
 9 all statements required by 50 U.S.C. § 1804 for electronic surveillance and 50 U.S.C. § 1823 for
 10 physical searches and, if the target is a United States person, the certification or certifications are not
 11 clearly erroneous on the basis of the statement made under 50 U.S.C. § 1804(7)(E) for electronic
 12 surveillance and 50 U.S.C. § 1823(a)(6)(E) for physical searches and any other information furnished
 13 under 50 U.S.C. § 1804(d) for electronic surveillance and 50 U.S.C. § 1823(a)(6)(E). *See* 18 U.S.C.
 14 §§ 1805(a)(1), (3), & (4); 1824(a)(1), (3), & (4).

15 Review of the fruits of the electronic surveillance and physical searches show Singh is the
 16 target of the applications. Singh is a “United States person” because he is alien lawfully admitted
 17 for permanent residence (as defined in section 1101(a)(2) of Title 8). 50 U.S.C. § 1801(j); USAO
 18 001701.

19 None of these necessary findings under 50 U.S.C. §§ 1805(a)(1), (3), & (4) or 1824(a)(1),
 20 (3) and (4) would be subject to the *Franks* hearing request. Accordingly, these findings would be
 21 subject to challenge by Singh if disclosure is granted and otherwise subject to this Court’s statutory
 22 obligation to conduct an *in camera*, *ex parte* review. *See infra*, pp. 12:15-13:19.

23 The final necessary finding the FISC judge must make for issuance of the ex parte order for
 24 electronic surveillance is the following finding:

25 (2) on the basis of the facts submitted by the applicant there is
 26 probable cause to believe that—(A) the target of electronic surveillance
 27 is a foreign power or agent of an agent of a foreign power: *Provided*,
 28 that no United States person may be considered a foreign power or
 agent of a foreign power solely upon the basis of activities protected
 by the first amendment to the Constitution of the United States; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or agent of a foreign power;

50 U.S.C. § 1805(a)(2).

The final necessary finding the FISC judge must make for issuance of the ex parte order for the physical search is the following finding:

(2) on the basis of the facts submitted by the applicant there is probable cause to believe that—(A) the target of electronic surveillance is a foreign power or agent of an agent of a foreign power: *Provided*, that no United States person may be considered a foreign power or agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and (B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or agent of a foreign power;

50 U.S.C. § 1824(a)(2).

Each of these necessary final findings regarding probable cause is the subject of the *Franks* hearing request. *Dagan*, 743 F.2d at 77 n.6. The standard for the determination of probable cause under 50 U.S.C. §§ 1805(a)(2) and 1824(a)(2) is this:

In determining whether or not probable cause exists for an order under subsection (a)(2), a judge may consider past activities of the target, as well as facts and circumstances relating to current or future activities of the target.

50 U.S.C. §§ 1805(b) & 1824(b).

There is no basis under 50 U.S.C. §§ 1801(a) and 1821(1) to find that Singh is a “foreign power.” 50 U.S.C. § 1801(a)(1)-(7). Further, due to the fact that Singh is a “United States person” under 50 U.S.C. § 1801(I), the definition of “agent of foreign power” in 50 U.S.C. § 1801(b)(1), is inapplicable to Singh. 50 U.S.C. § 1801(b)(1) (“any person other than a United States person, who”); 50 U.S.C. § 1821(1).

The only remaining statutory basis to support a probable cause finding that Singh is an “agent of a foreign power” is under 50 U.S.C. § 1801(b)(2). Discovery provides no basis to conclude that probable cause exists to support a finding that Singh is a person who engages in clandestine intelligence gathering under 50 U.S.C. §§ 1801(b)(2)(A) or (B), which activities involve or may involve a violation of the criminal statutes of the United States. And discovery provides no basis to

1 conclude that probable cause exists to support a finding that Singh is a person who knowingly
2 engages in “sabotage” as defined in 50 U.S.C. § 1801(d) under 50 U.S.C. § 1801(b)(2)(C).

3 Accordingly, “knowingly engages in ... international terrorism, or activities that are in
4 preparation therefor, for or on behalf of a foreign power” under 50 U.S.C. § 1801(b)(2)(C) or
5 “knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign
6 power” under 50 U.S.C. § 1801(b)(2)(D) are the specific findings Singh’s counsel requests the
7 opportunity to prove at a *Franks* evidentiary hearing that probable cause is lacking to support these
8 findings because the FISA applications and affidavits recklessly omit material information.

9 C. **Singh Has Made A Substantial Preliminary Showing That FISA
10 Applications And Affidavits Recklessly Omitted Material Facts
11 Necessary To The Finding That Singh Is An Agent Of Foreign
12 Power By Knowingly Engaging In International Terrorism, Or
Activities That Are In Preparation Therefor, For Or On Behalf
Of, A Foreign Power.**

13 A person who knowingly engages in international terrorism for a group which is engaged in
14 international terrorism is an agent of a foreign power. 50 U.S.C. §§ 1801(a)(4) & 1801(b)(2)(C).
15 “International terrorism” in turn means activities that:

16 (1) involve violent acts or acts dangerous to human life that are
17 violations of the criminal laws of the United States ... or that would
18 be a criminal violation if committed in the jurisdiction of the United
19 States ... (2) appear to be intended—(A) to intimidate or coerce a
20 civilian population; (B) to influence the policy of a government by
21 intimidation or coercion; or (C) to affect the conduct of a government
22 by assassination or kidnapping; and (3) occur totally outside the
23 United States, or transcend national boundaries in terms of the means
24 by which they are accomplished, the persons they appear intended to
25 coerce or intimidate, or the locale in which their perpetrators operate
26 or seek asylum

27 50 U.S.C. § 1801(c).

28 Singh’s counsel contends that the 2011 FISA applications and affidavits recklessly omitted
the material facts relating to the 2009 acquittal of the individual who Indian authorities claim planted
bombs in two incidents in the State of Punjab, India, and who Indian authorities further claim did
so at the direction Balwinder Singh. In January of 2009, Satnam Singh @ Satta, S/o Resham Sing,
Caste Jatt, R/o Lasuri, PS: Shahkot, District-Jalandhar, was **acquitted** of all criminal charges of
murder, attempted murder, and explosives violations relating to two bomb blast cases in the State

1 of Punjab, India. The only supposed “link” between these two incidents, Satnam Singh Satta, and
2 Balwinder Singh was supposedly supplied by Satta. These facts are exactly the kind of fact a judge
3 under FISC would find essential and its omission would be critical to any finding regarding alleged
4 international terrorism.

5 The first incident arose from an April 28, 2006 bomb blast in the District of Jalandhar, State
6 of Punjab, India, where reportedly three individuals were killed and at least ten individuals sustained
7 serious injuries. The second incident arose from a May 24, 2006 bomb blast where an empty bus
8 caught fire but no casualties were reported. Satnam Singh Satta was arrested in June of 2006 by
9 Indian police who claimed he had planted the bombs. Those same Indian police also claimed that
10 Satnam Singh Satta did so at the direction of Balwinder Singh. However, three years later, Satnam
11 Singh Satta was acquitted and no appeal was taken. Indian authorities charged Balwinder Singh with
12 these same charges in 2006 based upon their claim that Satnam Singh Satta “confessed” to planting
13 the bombs and he “confessed” that he did so at the direction of Balwinder Singh. That claim of
14 “confession” was not backed up by facts to prove that either Satnam Singh Satta or Balwinder Singh
15 had any role at all in these two bombings.

16 Therefore, the omission of these material facts is a substantial preliminary showing under
17 *Franks* which calls into question the FISC ex parte order for electronic surveillance and physical
18 searches based upon facts submitted by the applicant to support a finding that there is probable cause
19 to believe the target, Singh, knowingly engages in international terrorism. And, the omission of these
20 material facts hides what happened here. Without the evidence in 2011 to even make a probable
21 cause criminal terrorism case against Balwinder Singh after the 2009 acquittal of Satnam Singh
22 Satta, the Indian government relied upon outsourcing to the FBI and the United States to make a
23 criminal case through electronic surveillance and physical searches. Rather than obtaining a warrant
24 under the Fourth Amendment to justify the electronic surveillance and physical searches, these
25 governments used the guise of having a significant interest in the targeted person for foreign
26 intelligence purposes to build two criminal cases. And the assertion of “significant interest” is now
27 almost un-reviewable since the amendments to FISA under the Patriot Act.

Further, the reckless material omission of the true facts relating to Kamwal Khera, the single witness the FBI spoke with on September 14 and 28, 2011, including the true facts of his claim of status within the United States, the true facts of his relationship with Singh's wife, the true facts of his motivations for speaking with the FBI about Singh – are further areas subject to adversarial challenge in a *Franks* evidentiary hearing to the FISA applications and affidavits and FISC orders and extensions.

D. Singh Has Made A Substantial Preliminary Showing That FISA Applications And Affidavits Recklessly Omitted Material Facts Necessary To The Finding That Singh Is An Agent Of A Foreign Power By Knowingly Enters The United States Under A False Or Fraudulent Identity For Or On Behalf Of A Foreign Power.

A person who knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power is an agent of a foreign power. 50 U.S.C. § 1801((b)(2)(D). Singh's counsel contends that recklessly omitted from the FISA Applications and Affidavits is that Singh's immigration file contains proof that he did not enter the United States under a false or fraudulent identity. Within Singh's immigration file are copies of Indian documents showing a date of birth of 1975-02-15 in the name of Baljit Singh. USAO 000839-000941. Discovery shows that follow-up investigation post-FISA applications has found no birth certificate record or identification card record to dispute Singh's immigration file. Taken together, these facts are further proof for the need for an adversarial challenge in a *Franks* evidentiary hearing to the FISA application and affidavits and FISC orders and extensions.

E. Notwithstanding The Inherent Difficulties Applying *Franks* In The FISA Application And FISC Order Context, Singh Has Made A Concrete Factual Preliminary Showing Of Reckless Material Omissions Regarding The Most Salient Facts Concerning International Terrorism .

Singh's counsel requests that this Court recognize the inherent difficulty in applying *Franks* principles to FISA applications and FISC orders. As the court observed in *United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982):

We appreciate the difficulties of appellants' counsel in this case. They must argue that the determination of legality is so complex that an adversary hearing will full access to the relevant materials is

1 necessary. But without access to the relevant materials their claim of
2 completeness can be given no concreteness. It is pure assertion.

3 Congress is also aware of these difficulties. But it chose to resolve
4 them through means other than mandatory disclosure. ... [i]t cannot
be said that this exclusion [of defendants from the process] rises to
the level of constitutional violation.

5 *United States v. Belfield*, 692 F.2d 141, 148 (D.C. Cir. 1982). *See also United States v. Ott*, 827 F.2d
6 473, 476-477 (9th Cir. 1987) (no due process right to disclosure of FISA materials).

7 Despite these inherent difficulties, Singh's counsel has made a concrete showing with
8 reference to facts – and not mere assertions – in support of his request for a *Franks* evidentiary
9 hearing. And the concrete facts are the most salient facts with respect to the government's claim of
10 Singh's participation in the necessary acts under 50 U.S.C. § 1801(c) to find “international
11 terrorism” to support the derivative claim that Singh is a agent of a foreign power under 50 U.S.C.
12 § 1801(b)(2)(c), (d) or (e). For these reasons, a *Franks* evidentiary hearing is necessary. In
13 connection with the Franks hearing, this Court should grant Singh's motion for disclosure of FISA
14 applications and affidavits and FISC orders and extensions.

15 **IV. The FISA Derived Evidence Is Subject To Suppression If The Government Did**
16 **Not Establish The Other Necessary Statutory Prerequisites Apart From the**
Probable Cause Assessment.

17 This Court is required to review each application to ensure that it meets the additional
18 standards set out by FISA. Because the Court examines FISA materials de novo, no deference is
19 accorded the FISC judge's assessment of the executive branch certifications. *E.g., United States v.*
20 *Dumeis*, 424 F.3d 566, 578 (7th Cir. 2005).

21 First, this Court must find that: (1) the application was made by a Federal officer; (2) the
22 application was approved by the Attorney General; (3) the proposed minimization procedures meet
23 the statutory definitions of minimization contained in 50 U.S.C. § 1801(h) for electronic
24 surveillance, and 50 U.S.C. § 1821(4) for physical searches. *See* 50 U.S.C. §§ 1805(a), 1824(a). The
25 unofficial and uncertified transcripts of intercepted communications which have been produced are
26 consistent with an indiscriminate plan of electronic surveillance rather than one which follows proper
27 minimization procedures. *See Belfield*, 692 F.2d at 147 (“surveillance records which include a
28

1 significant amount of nonforeign intelligence information, calling into question compliance with the
 2 minimization standards in the order.”).

3 Second, this Court must find that the application contains the statements and certifications
 4 required by the statute, and that those statements and certifications were made by a designated
 5 official. 50 U.S.C. §§ 1805(4), 1824(a)(4). The following statements and certifications must
 6 accompany any application for an order approving searches or surveillance under FISA: a statement
 7 of the proposed minimization procedures; a statement of the nature of the foreign intelligence
 8 information sought and the type ;of communications or activities to be subjected to the surveillance,
 9 or the manner in which the physical search is to be conducted; certifications by an authorized official
 10 that the certifying official deems the information to be sought to be foreign intelligence information;
 11 a significant purpose of the surveillance or search is to obtain foreign intelligence information; and
 12 that such information cannot reasonably be obtained by normal investigative techniques; and a
 13 statement explaining the basis for the certifications. 50 U.S.C. §§ 1804(a), 1823(a).

14 Because Singh is a United States person, this Court must assess these statements and
 15 executive branch certifications to determine that they are not “clearly erroneous.” 50 U.S.C. §§
 16 1805(a)(4), 1825(a)(4). A “clearly erroneous” finding is established when “although there is evidence
 17 to support it, the reviewing court on the entire evidence is left with a definite and firm conviction
 18 that a mistake has been committed.” *United States v. United States Gypsum, Co.*, 333 U.S. 364, 395
 19 (1948).

20 **V. FISA, As Amended By The Patriot Act, Violates The Fourth Amendment.**

21 District Court Judge Aiken from the District of Oregon got it right in her constitutional
 22 analysis of 50 U.S.C. §§ 1804, 1823, as amended by the Patriot Act, in the now vacated judgment
 23 in *Mayfield v. United States*, 504 F.Supp.2d 1023 (D. Oregon 2007). Prior to the enactment of the
 24 Patriot Act, FISA required executive branch officials to certify to a FISA judge “that the purpose of
 25 the surveillance is to obtain foreign intelligence information.” *See* 50 U.S.C. §§ 1804(a)(7)(B)
 26 (2000). Courts interpreted FISA’s “the purpose” language to require a showing that “the primary
 27 purpose” of the surveillance is to obtain foreign intelligence. *See, e.g., Duggan*, 743 F.2d at 77;
 28

1 *United States v. Johnson*, 952 F.2d 565, 573 (1st Cir. 1991). The substantive issue before Judge
 2 Aiken in *Mayfield v. United States*, 504 F.Supp.2d 1023 (D. Oregon 2007), concerned the statutory
 3 change following the passage of the Patriot Act to a warrant under FISA now issuing if “a significant
 4 purpose” of the surveillance or search is foreign intelligence. *See* 50 U.S.C. §§ 1804(a)(6)(B),
 5 1823(a)(6)(B) (“that a significant purpose of the [surveillance] [search] is to obtain foreign
 6 intelligence information”).

7 Singh’s counsel incorporates by reference the District Court’s reasoning in *Mayfield*, 504
 8 F.Supp.2d at 1036-1043, regarding the unconstitutionality of FISA, as amended by the Patriot Act.
 9 Judge Aiken’s conclusion as to the unconstitutionality of that dramatic and significant impact on the
 10 application of FISA was as follows:

11 the constitutionally required interplay between Executive action,
 12 Judicial decision, and Congressional enactment, has been eliminated
 13 by the FISA amendments. Prior to the amendments, the three
 14 branches of government operated with thoughtful and deliberate
 15 checks and balances – a principle upon which our Nation was
 16 founded. These constitutional checks and balances effectively curtail
 overzealous executive, legislative, or judicial activity regardless of
 the catalyst for overzealousness. The Constitution contains bedrock
 principles that the framers believed essential. Those principles should
 not be easily altered by the expediencies of the moment.

17 Despite this, the FISCRC holds that the Constitution need not control
 18 the conduct of criminal surveillance in the United States. In place of
 19 the Fourth Amendment, the people are expected to defer to the
 20 Executive Branch and its representation that it will authorize such
 surveillance only when appropriate. The defendant [United States]
 here is asking this court to, in essence, amend the Bill of Rights, by
 giving it an interpretation that would deprive it of any real meaning.
 This court declines to do so.

21 ... A shift to a Nation based on extra-constitutional authority is
 22 prohibited, as well as ill-advised. ... Therefore, I conclude that 50
 23 U.S.C. §§ 1804 and 1823, as amended by the Patriot Act, are
 unconstitutional because they violate the Fourth Amendment of the
 United States Constitution.

24 *Mayfield*, 504 F.Supp.2d at 1042-1043.

25 The Ninth Circuit vacated the district court’s judgment in *Mayfield* because, in light of the
 26 limited remedy available to Mayfield under the terms of the Settlement Agreement between Mayfield
 27 and the United States, Mayfield lacked standing to pursue his Fourth Amendment claim because his
 28

1 injuries already had been substantially redressed by the Settlement Agreement, and a declaratory
2 judgment would not likely impact him or his family. *Mayfield v. United States*, 599 F.3d 964, 966
3 (9th Cir. 2010).

4 While the *Mayfield* district court decision holds no precedential value, the reasoning set forth
5 by the district court is “spot-on.” Singh’s counsel urges this Court to adopt it and order 50 U.S.C.
6 §§ 1804 and 1823 unconstitutional under the Fourth Amendment. The Ninth Circuit in *Cavanagh*
7 has held that where “the purpose of the surveillance is to obtain foreign intelligence,” FISA passes
8 constitutional muster. *Cavanagh*, 807 F.2d at 790-791. In *Sarkissian*, the Ninth Circuit expressly
9 declined to consider whether the primary purpose test was constitutionally required. *United States*
10 *v. Sarkissian*, 841 F.2d 959, 964 (9th Cir. 1988) (“We also decline to decide the issue. We have
11 generally stated the purpose of the surveillance must be to secure foreign intelligence information.”).
12 Singh’s counsel takes the position that the Ninth Circuit would adopt Judge Aiken’s analysis and
13 conclusions if the issue presents itself before the Court.

14 Investigations involving FISA surveillance and searches are different in kind from ordinary
15 criminal investigations. “FISA is meant to take into account the differences between ordinary
16 criminal investigations to gather evidence of specific crimes and foreign counterintelligence
17 investigations to uncover and monitor clandestine activities.” *Sarkissian*, 871 F.2d at 965 (citation
18 and quotation omitted). The government did not honor this distinction here, and as a result, the FISA
19 derived evidence is properly suppressed.

20 CONCLUSION

21 This Court should grant Singh’s counsel’s request for an evidentiary hearing pursuant to
22 *Franks*. In connection with that order, this Court should also order the disclosure of FISA
23 applications, affidavits certifications, and FISC orders and extensions.

24 In the alternative, this Court should conduct an *in camera*, *ex parte*, *de novo* review of the
25 FISA applications, affidavits, and certifications and the FISC orders and extensions and determine
26 whether the same complies with the FISA statutory requirements.

27 ///

1 Finally, this Court should find that 50 U.S.C. §§ 1804 and 1823 are unconstitutional because
2 these sections violate the Fourth Amendment if, as here, the “primary purpose” of the application
3 is not foreign intelligence.

4 DATED: June 26, 2016.

Respectfully submitted,

5 /s/ Michael Kennedy

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7 **CERTIFICATE OF SERVICE**

8 The undersigned certifies that he is a person of such age and discretion as to be competent
9 to serve papers and that he served a copy of the foregoing on June 26, 2016 through the Electronic
10 Filing System to the following:

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